matters by themselves show that the statement of the learned trial magistrate that the Public Prosecutor was not interested is unjustified.

Learned counsel for the respondent has emphasized that there had been a number of adjournments covering a period of more than one year up to the date the lower court made the order of discharge and that in the circumstances the Public Prosecutor should have taken steps to withdraw the charge against the respondent. As earlier mentioned, whether in any particular case there should be a prosecution or whether an accused person should be further prosecuted is a matter for the Public Prosecutor and it is not the function of the court to decide on the matter. The case of *Public Prosecutor* v. *Karumah*[3] cited by learned counsel for respondent does not, in my view, help the respondent. That case decided that where the prosecution asks for an adjournment to secure the attendance of prosecution witnesses in a case where the police investigation has been completed, the court should grant the adjournment applied for, and no more.

For the reasons given, the appeal is allowed. The order of discharge of the lower court is set aside and it is ordered that the accused be produced before the lower court for the case against him to continue according to law.

Appeal allowed;

Order of discharge set aside.

Solicitors: *Chan & Chan.*

PUBLIC PROSECUTOR v. LIEW SAM SEONG

[O.Cr.J. (Mohamed Azmi J.) September 3, 1981]

[Kuala Lumpur — Federal Territory Criminal Trial No. 11 of 1978]

Criminal Law and Procedure — Charge of having control of ammunition — Alleged discovery of ammunition on information given by accused — Police having prior knowledge of existence of exhibits — Circumstantial evidence insufficient to convict accused — Evidence Act (Revised 1971), s. 27 — Internal Security Act, 1960, s. 57.

Evidence — Alleged discovery of ammunition on information given by accused — Police having prior knowledge of existence of exhibits — Evidence Act (Revised 1971), s. 27.

In this case the accused was charged with the offence of having under his control ammunition. Apart from the circumstantial evidence, the prosecution relied on the information of the accused which led to the alleged discovery of the ammunition. There was evidence that the police had prior knowledge of the existence of the exhibits.

Held: (1) on the surrounding circumstances of the case and on balance of probabilities in the evidence, the police had knowledge of the existence of the incriminating exhibits at the premises before the alleged "discovery" after information said to be given by the accused. As such the provision of section 27 of the Evidence Act cannot apply, as the discovery could not be said to be the result of the information given;

(2) without the assistance of section 27 of the Act, the remaining prosecution evidence, which were entirely circumstantial, were insufficient to prove that the accused was in control of the incriminating exhibits at the material time;

(3) in this case the defence has raised more than a reasonable doubt and the accused must be acquitted.

Cases referred to:-

(1) *Sum Kum Seng* v. *Public Prosecutor* [1981] 1 M.L.J. 244.

(2) *Tai Chai Keh* v. *Public Prosecutor* [1949] M.L.J. 68.

(3) *Public Prosecutor* v. *Sihabduin bin Haji Salleh & Anor.* [1980] 2 M.L.J. 273.

(The following authorities were cited but not mentioned in judgment: *Sandra Margaret Birch* v. *Public Prosecutor* [1978] 1 M.L.J. 72; *Public Prosecutor* v. *Lee Kee Yok* (1924) 4 F.M.S.L.R. 1; *Chin Khing Siong* v. *R.* [1952] M.L.J. 74; *Ooi Hock Leong* v. *R.* [1955] M.L.J. 229; *Teo Thin Chan & Anor.* v. *Public Prosecutor* [1957] M.L.J. 184; *Tan Cheng Kooi & Anor.* v. *Public Prosecutor* [1972] 2 M.L.J. 115; *Public Prosecutor* v. *Teh Cheng Poh* [1980] 1 M.L.J. 251.)

CRIMINAL TRIAL.

Mohamed Shafee (Deputy Public Prosecutor) for the appellant.

Karpal Singh (*Ngeow Yin Ngee* with him) for the respondent.

Cur. Adv. Vult.

Mohamed Azmi J.: The accused is charged for a security offence in the following amended terms:

"That you on December 28, 1977 at about 11.45 a.m. at No. 97A Jalan 29 Oversea Union Garden, in the Federal Territory of Kuala Lumpur, being a security area as such vide P.U.(A) 148, dated May 15, 1969, without lawful excuse or authority did have under your control ammunition, to wit, 13 rounds of .25" (6.35 mm) live ammunition, and 5 home-made handgrenades (primed) and 3 home-made bombs and that you have thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act, 1960 (Revised 1972)."

Briefly, the facts of the Prosecution case are that on December 18, 1977, the accused was arrested by D.S.P. Yee Chan Lam (PW8) at Jalan Cecil, Kuala Lumpur. In the wallet of the accused, D.S.P. Yee found, *inter alia*, the N.R.I.C. of the accused (Exhibit P17A) and another N.R.I.C. belonging to Eng Ah Suan (Exhibit P17B). He also found a bunch of keys in the pocket of the accused. For security reasons, D.S.P. Yee did not lodge a police report of the arrest; nor did he issue a search list in respect of the accused. Instead, the accused was handed to A.S.P. Mohd. Noor who lodged a report of the arrest, and another officer under the direction of A.S.P. Salleh bin Gomu issued a search list in respect of articles found on the accused person. On the same day at about 6.00 p.m., the accused was handed by A.S.P. Mohd. Noor to Inspector Wong Kim Meng (PW1) for interrogation. Inspector Wong interrogated the accused daily, and on the 10th day, i.e. December 28, 1977, the accused gave certain information to Inspector Wong which led to the discovery of the ammunition, home-made grenades and home-made bombs as stated in the charge, at No. 97A, Jalan 29, Oversea Union Garden, Kuala Lumpur. After the discovery, Inspector Wong drew a sketch plan of premises No. 97A (see Exhibit P3) and issued a search list which was acknowledged by the accused (see Exhibit P8). On the instruction of Inspector Wong, 16 photographs (Exhibits P2A to R) were taken at the scene by police photographer Abu bin Ahmad (PW3). The exhibits recovered from first, second and fourth rooms of premises No. 97A were taken to Brickfields Police Station, where Inspector Wong lodged a police report. The thirteen rounds of .25 ammunition (Exhibits P4 and P4B), the five home-made grenades (P6, P6A and P6B) and the three home-made bombs

(P7, P7A and P7B) were handed to Inspector Chandra (PW2) who, in turn, handed them and other exhibits to the Investigating Officer, Inspector Abdul Hamid bin Othman (PW6). Subsequently, the Investigating Officer handed the ammunition, handgrenades and bombs to A.S.P. Wong Ban Foo (PW5) — the Federal Territory Contingent Armament Officer who prepared three reports with diagrams of the exhibits (see Exhibits P12, P12A & B, P13 and P14). Samples of the explosive substance in the handgrenades and bombs (Exhibits P11A to D) were also sent by the Investigating Officer to the Chemist, Mr. Lau Cheng Siew (PW4) for analysis. The accused was accordingly charged.

In this case, having regard to the evidence adduced, I found the Prosecution have made out a *prima facie* case against the accused. As regards arrest, I accept the evidence of D.S.P. Yee (PW8) that it was he who arrested the accused on December 18, 1977 at Jalan Cecil although the Police Report on the arrest was lodged by A.S.P. Abdul Hamid. I also accept the evidence of D.S.P. Yee that it was he, who searched the accused and found the two N.R.I.C.s in the wallet of the accused and a bunch of keys in his trousers pocket, although the search list was prepared by another Police Officer under the direction of A.S.P. Salleh bin Gomu. The Prosecution have also adduced *prima facie* evidence that the accused did give information to Inspector Wong which led to the discovery of the ammunition, home-made handgrenades and bombs. The admissible part of the information under section 27 Evidence Act is as follows:

"I kept certain subversive documents, ammunition and handgrenades in my house at No. 97A Jalan 29, Oversea Union Garden, Kuala Lumpur. I agree to take you to my house."

There is also *prima facie* evidence that the police party headed by Inspector Wong and assisted by Inspector Chandra Segran (PW2) was led by the accused to premises No. 97A, and that the accused indicated to one of the keys which had been recovered from his trousers pocket at time of his arrest, as the key for the collapsible iron gate to the front door of the premises. From the information which led to the discovery, and the fact that the accused was in possession of the key to the front door collapsible iron gate, as supported by the evidence of the chief tenant Wong Kam Fah (PW7), and also the evidence of Inspector Wong and Inspector Chandra that there was only one bed in the entire premises, and that the accused changed his clothing in the first room after the discovery of the incriminating exhibits, there are, in my view, sufficient evidence to prove that he was in control of the ammunition, handgrenades and bombs as stated in the charge. From the evidence of the Armourer and Government Chemist, A.S.P. Wong Ban Foo and Mr. Lau Cheng Siew, there is no doubt at all that all the exhibits are serviceable. I am satisfied from their evidence and reports that the handgrenades are complete grenades, and both the bombs and grenades contained explosive substance. In the event, I call the accused to enter his defence.

The accused who gave evidence on oath, denied that he was staying at the premises at the material time and he also denied any knowledge of the ammunition, handgrenades and bombs. It is his defence that his communist friend Eng Ah Suan was the paying tenant of premises No. 97A at the material time. After the tenancy was taken up in 1977, Eng Ah Suan with four or five others, including two girls by the name of Leong Pooi Choo and Ah Peng, stayed there at all material times. He himself was staying at No. 14, Jalan 29, Selayang Baru, Kuala Lumpur, but he had occasions to visit Eng Ah Suan at No. 97A, as by that time he had become a member of the Malayan National Liberation Front (MNLF). The accused denies giving the information leading to the discovery of the exhibits as alleged by Inspector Wong, and even if the information had been given, it was done as a result of inducement. From circumstantial evidence, it is also the contention of the defence that after the accused was arrested on December 18, 1977, the police had gone to premises No. 97A and, as such, they already knew about the existence of the incriminating exhibits in the premises before the accused was alleged to have given the information and led the police party to the recovery of the exhibits. As such, on this particular issue, the defence is two-fold. Firstly, the accused alleged in cross-examination that he was induced to give the information by Inspector Wong and other police interrogators. Secondly, even if the information had been given, it is inadmissible under section 27 of the Evidence Act on the ground that the police already knew about the existence of the incriminating exhibits in the premises before the information was given. Having considered the evidence of the accused and his witness, Sgt. Saaban bin Hassan (DW2), I find the defence has created considerable doubt in the prosecution case on the issue of information allegedly given by the accused to Inspector Wong. *Sarkar* on Evidence, 12th Edition, at page 287 has this to say on the subject of misuse of section 27 by the police:

"Section 27 has frequently been misused by the police and courts should be vigilant about the circumvention of its provisions.... When a fact is once discovered from information received from another source, there can be no discovery again even if any information relating thereto is subsequently extracted from the accused. A device sometimes adopted by the police is to stage a scene and take the accused to the place where the things discovered laid buried or hidden and require him to make a search for them at the spot indicated to the accused.... It has been observed that it has become a normal device of the investigating agency to turn an ordinary recovery into a discovery in order to utilise the provisions of section 27. [*Amin* v. *S.* A 1958, A 293, 300]."

In the present case, there is no reason to doubt Sgt. Saaban's evidence that the chief tenant Wong Kim Fah (PW7) had lodged a police report at Petaling Police Station on December 21, 1977 (see Exhibit D16). The gist of this report is that Wong (who occupied the ground floor directly below No. 97A) had seen strangers occupying premises No. 97A. The report is consistent with Wong's testimony in cross-examination that two days before he lodged the police report (i.e. on December 19, 1977), he saw three persons — a Malay, a Chinese and one Indian — going upstairs to premises No. 97A in a suspicious manner. According to Sgt. Saaban, when he went to the premises to investigate on December 21, 1977, a male Indian came downstairs to unlock the collapsible iron gate. The man told him that he was from Special Branch and produced his Authority Card. The Sergeant was satisfied with the explanation and went upstairs with the male Indian, where he saw six or seven persons sleeping in the hall covered with blankets. In this connection, I have no hesitation in accepting the evidence of Sgt.

Saaban. Since the accused was arrested on December 18, and the only bunch of keys to the premises were found on him, it is reasonable to assume that the three persons whom Wong Kim Fah saw on December 19 and also the people whom Sgt. Saaban saw in the premises on December 21, must be from the police, and they must have used the keys recovered from the accused on December 18 to gain entry to the premises without the help of the accused. As such, the fact that it was the accused who unlocked the door for the police on December 28, does not carry much weight in the prosecution case. I cannot accept prosecution contention that the people found in the premises might be communist elements, because after the arrest of the accused, it would have been dangerous for any member of the MNLF to visit or stay on the premises. The only reasonable inference to be drawn is that, after the arrest of the accused on December 18, a police party must have gone to the premises by using the bunch of keys recovered from the accused, and they stayed there in ambush, but unfortunately for them, only Sgt. Saaban appeared on December 21. In view of the quantity of ammunition, handgrenades, bombs and other incriminating exhibits found on the premises, it is also reasonable to assume that the police must have known about their existence from December 19 or 21. As such, it is my finding that this is a clear case where the police investigation is attempting to turn an ordinary 'recovery' of incriminating exhibits into a 'discovery' in order to utilise the provisions of section 27 Evidence Act. In the circumstances, even if the accused had given the alleged information to Inspector Wong on December 28, 1977, the provision of section 27 cannot be invoked, and both the information given and the fact of discovery are accordingly inadmissible. In view of my finding, it is unnecessary for me to go into the question of whether it is fatal for the prosecution for not calling D.P.C. Yu Ching Nee (being the only other witness who was present when the alleged information was given to Inspector Wong); or on the question of whether it is fatal for the Prosecution for failing to produce the police report lodged by Inspector Wong after the discovery which contained the alleged information, and also for failure to produce the piece of paper which Inspector Wong had recorded the information in view of the decision of the Federal Court in *Sum Kum Seng* v. *Public Prosecutor*.[1] The learned Deputy Public Prosecutor has conceded that, if the court found that the police had already known of the existence of the incriminating exhibits at the premises prior to December 28, then section 27 of the Evidence Act would not apply. Be that as it may, it is the submission of the learned Deputy Public Prosecutor that apart from section 27, there are circumstantial evidence to prove that the accused was in control of the incriminating exhibits.

Based purely on circumstantial evidence, it is my finding that the prosecution case is extremely weak. The circumstantial evidence referred to by the learned Deputy Public Prosecutor are as follows. Firstly, there is the evidence of Inspector Chandra (PW2) and Inspector Wong (PW1) that during the search of the premises, the accused pointed to the various incriminating exhibits. In *Tai Chai Keh* v. *Public Prosecutor*,[2] it was held that evidence that an accused person has pointed out objects or places to the police is of little value and often prejudicial to the accused, unless the information which led to the discovery is disclosed at the same time. As such, I am of the view that the evidence of Inspector Chandra and Inspector Wong on this point does not help the prosecution. Secondly, it is argued that the fact that the accused was found to be in possession of the keys to the premises at the time of his arrest coupled with the evidence of Wong Kim Fah that the accused misled him into believing that he was Eng Ah Suan are strong circumstantial evidence that he was in sole control of the premises and, therefore, of the incriminating exhibits. Further, there is also evidence by Inspector Chandra and Inspector Wong that at the time of the search, they found only one bed in the entire premises and that the accused was allowed to change his clothing and took new clothing from the first room. In addition, the accused signed the search list after the discovery of the exhibits. I have taken all these circumstantial evidence into consideration and taking them together, including the evidence of the accused pointing at the exhibits, I find the defence has cast a reasonable doubt in the prosecution case on the issue of control of the incriminating exhibits. The very fact that other people were found in occupation of the premises on December 19 and December 21 in itself would show that the accused could not have been in sole control of the premises and the exhibits on the date as stated in the charge.

It is my finding that the accused has given a reasonable explanation as to how he came to be in possession of Eng Ah Suan's N.R.I.C. (Exhibit P17B) and the keys to the premises (which are not produced). According to the testimony of the accused, on December 17, 1977, Eng Ah Suan came to his office at China Press, Brickfields, and told him that one of the girls, Leong Pooi Choo, had been arrested and that he wanted to leave Kuala Lumpur in a hurry. Eng Ah Suan gave him his N.R.I.C. and a bunch of keys (which included the ignition key to his motorcycle) with instruction to sell the motorcycle for him. In my view, there is nothing unreasonable in the explanation, particularly having regard to the fact that Eng Ah Suan was in fact killed by Security Forces at Gopeng on December 26, 1977, i.e. 8 days after the arrest of the accused.

As regards the evidence of chief tenant Wong Kim Fah (PW7) who positively identified the accused as Eng Ah Suan, it is significant to note that according to his evidence in cross-examination, two persons came to negotiate the renting of premises No. 97A. He identified one of them as the accused. He also testified that he was positive that the accused was Eng Ah Suan because the photograph in the N.R.I.C. given to him was that of the accused. In my view, there must be some confusion on the part of Wong, because if the accused had misrepresented himself as Eng Ah Suan by giving Eng Ah Suan's N.R.I.C. to Wong, then there is no explanation to Wong's allegation that the photograph in the N.R.I.C. given to him was that of the accused. Even by visual examination of the two N.R.I.C.s, it is apparent that the two photographs are entirely different. Both the N.R.I.C.s have not been tampered with (Exhibit P17A and P17B) and, as such, there is no question of the accused mis-

representing himself as Eng Ah Suan by using Eng Ah Suan's N.R.I.C. In my view, the explanation given by the accused is more reasonable. According to him, in the latter part of September 1977, Eng Ah Suan approached him and told him that he wanted to rent a place. Both of them met Wong Kim Fah; and after inspecting the premises, Eng Ah Suan agreed to rent the place. When Eng Ah Suan took out his N.R.I.C., the accused took it and passed it to Wong. I am therefore satisfied that it was Eng Ah Suan and not the accused who rented the premises from Wong.

As regards the fact that there was only one bed in the whole premises, and the fact that the accused kept his clothing in one of the rooms in the premises, I am of the view that such evidence are insufficient to prove that the accused was in control of the incriminating exhibits. In fact, from the evidence of Sgt. Saaban, he found about six or seven persons sleeping on the floor in the hall on December 21. Thus, the mere fact that there was only one bed in the premises is neither here nor there as far as the question of control or possession is concerned. Similarly, the fact that the accused had his clothing in one of the rooms and the fact that he had signed the search list cannot clothe him with having the control of the premises and exhibits.

On the surrounding circumstances of this case and on balance of probabilities in the evidence, I accept the defence contention that the Police had staged a scene on December 28, 1977 after they had knowledge of the existence of the incriminating exhibits at the premises. During the ten days' interrogation, Inspector Wong managed to 'break' the accused and persuaded him to give the information leading to the alleged 'discovery' when, in fact, the incriminating exhibits had already been recovered by the police at the premises. As such, the provision of section 27 cannot apply, as the discovery cannot be said to be the result of the information given.

Without the assistance of section 27 of the Evidence Act, I find the remaining prosecution evidence, which are entirely circumstantial, are insufficient to prove that the accused was in control of the incriminating exhibits at the material time.

Having regard to all the evidence in this case, I find the defence has raised more than a reasonable doubt in the prosecution case. And on the authority of Federal Court in *Public Prosecutor* v. *Sihabduin bin Haji Salleh & Anor.*[3] on the interpretation of regulation 17 of the Essential (Security Cases) Regulations 1975, I find the accused not guilty. He is acquitted and discharged.

Accused acquitted and discharged.

Solicitors: *Ngeow & Co.*

ONG YOKE ENG & ANOR. v. LIM AH YEW

[O.C.J. (Arulanandom J.) April 24, August 4, 1975; July 7, October 6, November 4, 5, 1980; January 27, June 29, July 6, 20 and September 9, 1981]

[Penang — Civil Suit No. 424 of 1974]

Practice and Procedure — Recall of witness after case is closed in civil proceedings — Court's discretion.

At the commencement of the trial in a running down case the defendant admitted liability and the trial proceeded solely on the matter of quantum. The plaintiff concluded her case and submissions were made both by the defendant's counsel and plaintiff's counsel after which the matter was adjourned to a date to be fixed. Subsequently on May 6, 1981 the plaintiff by a notice of motion applied to court for the plaintiff to be allowed to re-open her case and give further evidence and also to call a witness who is her coffee-shop assistant. The defendant's counsel objected to the application.

Held, allowing the plaintiff's application:- (1) in civil proceedings, it is in the discretion of the court of first instance to recall a witness or call further witnesses after his case is closed; although under ordinary circumstances it may not be necessary or permissible to allow a witness once examined and dismissed by a party to be recalled for it is expected that the advocate will interrogate him on all material points touching his case, unforeseen situations may develop and there may be also inadvertent omissions;

(2) the court may at its discretion allow a witness to be recalled, but surprise or prejudice to the other party should be guarded against;

(3) in the present case the defendant's objection was not on the above anticipated grounds. Nevertheless, on allowing the application, the court granted liberty to be defendant to cross-examine the recalled witness and further witnesses and call evidence in rebuttal.

CIVIL SUIT.

Triptipal Singh for the plaintiff.

Lim Ewe Hock for the defendants.

Cur. Adv. Vult.

Arulanandom J.: This was a running down case where at the commencement of the trial the defendant admitted liability and the trial proceeded solely on the matter of quantum.

The plaintiff concluded her case and submissions were made both by defendant's counsel and plaintiff's counsel after which the matter was adjourned to a date to be fixed.

Subsequently on May 6, 1981 the plaintiff by a notice of motion applied to court for the plaintiff to be allowed to reopen her case and give further evidence and also to call a witness who is her coffee shop assistant.

Her reasons for making this application were given in her affidavit affirmed on May 5, 1981.

In her affidavit she says *inter alia*: —

"3. On the 5th day of November 1980 I gave evidence before the Honourable Court to the effect *inter alia* that my late husband ran a coffee stall and gave me about $300 per month for upkeep and maintenance of the family. I also said that I helped my deceased husband in the business full time. After his death I carried on the said business and I employ (sic) an assistant.

4. At the time of giving evidence I omitted to state how much I was paying my assistant who was helping me in the coffee stall.

5. I say that this part of the evidence is vital in order to